

**Summary of SC94442, *Curt Peters and Cheri Peters v. Wady Industries Inc. and Patrick Terrio***

Appeal from the St. Charles County circuit court, Judge Jon Cunningham  
Argued and submitted February 24, 2015; opinion issued June 7, 2016

**Attorneys:** The Peterses were represented by Eric D. Holland, Gerard B. Schneller, Steven L. Groves and Patrick R. Dowd of The Holland Law Firm in St. Louis, (314) 241-8111; and J. Mark Kell of Kell Lampin LLC in St. Peters, (636) 757-1700. Terrio was represented by Teresa M. Young, John P. Rahoy and Kelly M. Brunie of Brown & James PC in St. Louis, (314) 421-3400. The Missouri Association of Trial Attorneys, which filed a brief as a friend of the Court, was represented by Michael W. Manners of Langdon & Emison in Lexington, (660) 259-6175.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** An injured worker and his wife appeal the circuit court’s judgment dismissing their negligence claims against a project manager for the worker’s employer. In a decision written by Chief Justice Patricia Breckenridge and joined by three other judges, the Supreme Court of Missouri affirms the judgment. For cases such as this that arose prior to 2012 amendments to the exclusivity provisions of the state’s workers’ compensation law, co-employees do not have immunity from suits by injured fellow employees. Rather, common law governs liability. To the extent a common-law “something more” test since has been interpreted to require purposeful and dangerous conduct for the co-employee to be liable, the test conflicts with common law and should not apply to co-employee liability cases arising prior to the 2012 amendments. Applying common law to this case, the injured worker and his wife failed to state a cause of action against the project manager because they failed to allege the co-worker owed any duty of care separate and distinct from the employer’s nondelegable duty to provide a safe workplace.

Judge Zel M. Fischer concurs in result but would continue to apply the “something more” test, effectively codified in the 2012 amendment, consistently with its well-established meaning – that an employee may sue a fellow employee only for affirmative negligent acts outside the scope of the employer’s responsibility to provide a safe workplace.

Judge Paul C. Wilson also concurs in result. He is doubtful about the discussion of common law co-employee liability and is concerned that resolution of this case does not require abandoning the well-established rule that a co-employee cannot be liable to an injured worker unless the co-employee commits an affirmative negligent act.

Judge Richard B. Teitelman dissents. He would find that an employer’s obligation to protect its employees does not extend to injuries caused by the negligence of employees in carrying out the details of the work directed by the employer and that the injured worker and his wife’s petition supports a conclusion that the worker was injured as a result of the project manager’s actions.

**Facts:** Curt Peters was injured while working for Tramar Industries Inc., which specializes in providing services and products to construction contractors. Among its services, Tramar delivers dowel baskets, which are 200-pound rebar paver baskets used in concrete construction and manufactured by Wady Industries. Wady shipped the baskets to Tramar stacked without warning, bracing or other precautionary measures. Tramar kept the baskets stacked in this manner and, once needed, moved the baskets to a specified construction site in the same stacked manner in which Wady shipped them. Patrick Terrio, a project manager for Tramar, had been warned by other employees about the potential safety hazards posed by the stacked dowel baskets. Despite these warnings, in September 2008, Terrio ordered the baskets to be delivered to a construction site on a flatbed truck while stacked in the same manner in which Wady shipped them. A row of baskets fell from the truck onto Peters, causing permanent and catastrophic injuries. Peters and his wife subsequently sued Wady and Terrio, asserting, among other claims, a claim alleging Terrio was negligent by breaching his duty to exercise reasonable care. In his answer, Terrio raised affirmative defenses including that the Peterses' claim was barred by state workers' compensation laws and that they failed to state a claim. The circuit court sustained Terrio's motion to dismiss, finding that the Peterses failed to allege that Terrio owed a duty independently of Tramar's nondelegable duty to provide a safe workplace. The Peterses appeal.

**AFFIRMED.**

**Court en banc holds:** (1) At the time Peters was injured, the state's workers' compensation law provided no immunity to co-employees from common-law negligence actions. The relevant statute addressed an employer's liability under the workers' compensation law for accidents arising out of and in the course of an employee's employment and released employers from all other liability for the work-related accident, but it was silent as to co-employees. The statute's plain language, therefore, pertained only to employers, and the relevant definition of "employer" did not extend to a co-employee. It follows that the statute did not release co-employees from any liability resulting from the work-related accident. Despite the plain language of the exclusivity provisions, Missouri courts since the 1982 appeals court decision in *State ex rel. Badami v. Gaertner* have held extended an employer's immunity under the workers' compensation law to co-employees in limited circumstances. Instead of applying common-law principles to find that the co-employees could not be held liable for failure to fulfill their employer's nondelegable duty to provide a safe workplace, *Badami* considered whether the exclusivity provisions under workers' compensation law applied to co-employees discharging their employer's duty to provide a safe workplace. *Badami* found a co-employee has immunity under workers' compensation law when discharging the employer's nondelegable duties and that a plaintiff must allege "something more" than a mere failure to fulfill the employer's duty to provide a safe workplace to find actionable negligence. Instead of analyzing the co-employee's liability in terms of whether the co-employee breached a common-law duty owed independently of any master-servant or agent-principal relationship, *Badami* analyzed whether the co-employee fits within the employer's immunity under workers' compensation law. While the resulting "something more" test was consistent with the common-law principle that co-employees cannot be liable for breaching an employer's nondelegable duty to provide a safe workplace, the extension of "immunity" to co-employees under the workers' compensation law was inconsistent with the plain language of the exclusivity provisions. A court cannot read or add co-employees into the statutory language to grant them the same immunity from common-law actions that is

granted to employers. As such, at the time of Peters' injuries, the relevant statute did not provide immunity to co-employees such as Terrio. The statute was amended in 2012 to provide immunity to co-employees except when the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. As such, this Court holds that the exclusivity provisions of the state's workers' compensation law provide no immunity to co-employees in cases involving injuries occurring before the 2012 amendments.

(2) An injured employee cannot maintain a common-law negligence action against a co-employee when the duties breached were part of the employer's nondelegable duty to provide a safe workplace. Following this Court's 1936 decision in *Lambert v. Jones*, co-employees are liable under common law to their fellow employees only for breaches of a duty owed independently of the master-servant relationship – a duty separate and distinct from the employer's nondelegable duties – even if the injury results from transitory risks created by the co-employee's negligence in carrying out the details of his work, including injuries resulting from the tools furnished, the place of work or the manner in which the work was being done.

(3) In adopting the "something more" test as a means of determining when immunity applies to co-employees, the appeals court in *Badami* believed that an old distinction between misfeasance (negligent performance of a duty) and nonfeasance (failure to perform a duty) remained and that there must be an affirmative act for the co-employee to be held liable. To the extent cases applying the "something more" test require more than allegations of the failure to fulfill the employer's nondelegable duty to provide a safe workplace, they are consistent with common law. But to the extent the "something more" test used after this Court's 2002 decision in *State ex rel. Taylor v. Wallace* requires purposeful, inherently dangerous conduct, it conflicts with common law co-employee liability.

(4) The Peterses' petition fails to state a cause of action against Terrio because they fail to allege breach of a duty Terrio owed that was separate and distinct from Tramar's duty to provide a safe workplace. The duties to provide safety equipment, a sufficient number of competent employees and a safe place to unload the stacked dowel baskets fall squarely within the employer's duty to provide a safe workplace and cannot constitute duties separate and distinct from the employer's nondelegable duty to provide a safe workplace. Further, the pleadings do not support the Peterses' assertion on appeal that the unsafe work environment resulted solely from Terrio's negligence in carrying out the details of his work. As this Court has explained in the past, part of an employer's duty in providing a safe work environment is providing a safe method of work. The Peterses' allegations as to the unsafe stacking of the baskets go to the manner in which the work was being performed under Tramar's standard operating procedures – a classic case of an employee breaching the employer's nondelegable duty to provide a safe workplace.

**Opinion concurring in result by Judge Fischer:** The author concurs with the result reached by the principal opinion but would overrule the 1994 appeals court decision in *Leeper v. Asmus* and would continue to apply the "something more" test consistently with its well-established meaning in this Court – that is, an employee may sue a fellow employee only for affirmative negligent acts outside the scope of the employer's responsibility to provide a safe workplace. The legislature effectively codified the "something more" test in its adoption of the 2012 amendment to the workers' compensation law.

**Opinion concurring in result by Judge Wilson:** The author concurs in the result reached by the principal opinion but is doubtful about the discussion of common law co-employee liability. He is concerned that resolution of this case does not require abandoning the well-established rule that a co-employee cannot be liable to an injured worker unless the co-employee commits an affirmative negligent act.

**Dissenting opinion by Judge Teitelman:** The author would reverse the judgment of dismissal and send the case back for further litigation to develop the facts of the case. He would find the Peterses' petition supports a conclusion that Peters was injured as a result of Terrio's actions. The employer's obligation to protect its employees does not extend to injuries caused by the negligence of employees in carrying out the details of the work directed by the employer. The Peterses' petition alleges Terrio breached a duty to exercise care for Peters' safety by causing Peters to perform his work in a particular, detailed and unreasonably dangerous manner.